No. 09-379

SUPREME COURT, U.S.
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In The Supreme Court of the United States

WILBUR ALLMOND,

Petitioner,

v.

AKAL SECURITY, INC., and ERIC HOLDER,
Attorney General of the United States,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

(1) The majority rule regarding the elements of a business necessity defense is not in dispute. In six circuits a defendant asserting that defense to a disparate impact claim must establish "the probability of occurrence" of the problem which the disputed practice is claimed to avoid. *EEOC v. Exxon Corp.*, 203 F.3d 871, 875 (5th Cir. 2000); see Pet. at 12-30. From the outset of the instant litigation the key issue has been whether the Eleventh Circuit would reject that standard; that is precisely the outcome sought, and achieved, by the government in the court below.

The practice at issue in this case had earlier been challenged in *Gunnels v. Akal Security, Inc.*, (No. V-02-132, S.D.Tex.). There, as here, the defendant asserted that the USMS unassisted hearing test rule was required by business necessity. On February 19, 2004, the District Court in *Gunnels*, applying the Fifth Circuit standard in *EEOC v. Exxon Corp.*, denied the defense motion for summary judgment based on that asserted defense. The government agreed to settle *Gunnels* in March 2004.

The complaint in the instant case was filed in December 2004, nine months later. The instant case concerns the same USMS practice as in *Gunnels*, was brought against the same employer (Akal Security), and was filed by the same private attorneys. In seeking summary judgment below on its proffered business necessity defense, the defendants relied on essentially the same arguments and supporting

material which the court in *Gunnels* had earlier found insufficient under the Fifth Circuit's decision in *EEOC v. Exxon Corp.*. The defendants never claimed that they had "probability of occurrence" evidence with regard to any of the various hearing-aid related problems that they hypothesized might arise. In its brief in opposition the government does not assert that the record contains evidence that would satisfy that Fifth Circuit standard.[1] Thus in the litigation below the defendants could prevail only if the Eleventh Circuit adopted a business-necessity standard which – unlike the Fifth Circuit and other circuits – does not require proof of probability of occurrence.

In the court of appeals petitioner emphatically argued that the defendants had failed to establish the asserted business necessity defense because they had no evidence as to the likelihood that any of the hypothesized problems would ever actually occur.

> There simply is no proof in this record of *any* significant risk by allowing CSOs to hear well with hearing aids ... The defendants had the obligation to present evidence ... They could have presented data showing, for example, reliability problems of hearing aids, failure rates of hearing aids, CSO problems with hearing aids, or current

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[1] The brief in opposition argues only that the record "does not suggest that [those possible problems] can be eliminated." (Br.Opp. n.1).

> law enforcement issues with hearing aids. They did not do so....[2]

Petitioner argued that such proof is a necessary element of a business necessity defense.

> [T]he parties part company over the notion that *any* hypothetical risk means that an individual can be dismissed from their job no matter how competent their performance is. Both logic and disability law disagree.... "[B]ecause few, if any, activities in life are risk free, *[School Board of Nassau County v.] Arline* [480 U.S. 273 (1987)] and the ADA do not ask whether a risk exists, but whether it is significant." *Bragdon v. Abbott*, 524 U.S. 624, 649 (1998). There is no such showing here.[3]
>
> Were parties allowed to *speculate* about disability-related problems, the ADA and Rehabilitation Act would be written out of existence.... It is for this reason that the legal standard is not whether there is a conceivable risk but whether the risk is significant or substantial.[4]

Petitioner urged the Eleventh Circuit to apply the Fifth Circuit standard in *EEOC v. Exxon Corp.*, "which requires proof that the risks are real," and the Third Circuit standard in *Verzeni v. Potter*, 109 Fed.Appx.

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[2] Reply Brief of Appellant Allmond at 25-26.

[3] *Id.* at 17 (emphasis in original).

[4] *Id.* at 21 (emphasis in original).

485 (3d Cir. 2004), "[which] requires that the employer prove ... the probabilities that the disability will cause harm."[5] The government, on the other hand, insisted that it had demonstrated the existence of business necessity simply by showing that "there is always an unavoidable possibility," which could not "be eliminated," that an employee's disability would lead to injury.[6]

The briefs in the court below thus presented a clear choice between two very different legal standards. The Eleventh Circuit adopted the business necessity standard that had been advanced by the government.

> Because hearing aids may malfunction, break, or become dislodged, the Marshals Service adopted the ban to ensure that all officers can perform their jobs safely and effectively in the event they must rely on their unaided hearing.... [W]e accept this justification as legitimate and wholly consistent with business necessity.

(Pet. App. 9a) (footnote omitted). This holding is perfectly straightforward. The "justification" which established business necessity was "[b]ecause hearing aids *may* malfunction, break, or become dislodged." (Emphasis added). The operative standard is "may,"

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[5] *Id.* at 22 n.3, 23-24; see *id.* at 28-29 (citing *Strathie v. Dept. of Transportation*, 716 F.3d 227 (3d Cir. 1983)).

[6] Brief for the Attorney General at 31-32.

not, for example, "do often" or "will in a significant number of instances." As the court of appeals explained in an accompanying footnote, this "may" standard can be satisfied by a hypothetical problem that in reality "may never occur." (Pet. App. 9a n.7). The government had conceded that it was unaware of any instance in the history of law enforcement in which a hearing aid failure had caused a problem.[7]

The government makes several alternative efforts to explain away the literal language of the Eleventh Circuit opinion. First it contends that

> the court's statement that hearing aids "may malfunction, break, or become dislodged," does not enunciate a new standard of law regarding the probability required to make out a showing of business necessity. Rather, the quoted language simply identified the numerous varieties of hearing aid failure....

(Br.Opp. 9). But the next sentence in the court's opinion expressly characterizes the quoted passage, not as a mere "identifi[cation]" of some facts about hearing aids, but as the "justification" which the court of appeals found legally sufficient.

Second, the brief in opposition asserts that the Eleventh Circuit found that business necessity had been established by "the uncontested risks acknowledged by both sides' experts." (Br.Opp. 6). But the

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[7] R5-101, Ex. G at 31; R5-101, Ex. U at 284-85.

only thing that was "uncontested" was that the problems hypothesized by the defendants were not impossible. The plaintiff's witnesses insisted those imagined scenarios were "quite unlikely."[8]

Third, the government contends that the court of appeals "merely held that, on the record in this case, there was no genuine issue of material fact." (Br.Opp. 7). But the court's holding relied only on a single part of the record, which the Eleventh Circuit regarded as legally conclusive: "hearing aids may malfunction, break, or become dislodged." (Pet. App. 9a). If this alone is legally sufficient, as the court of appeals held, that has to mean that no additional evidence, such as the probability of occurrence evidence required by the Fifth Circuit, is necessary in the Eleventh Circuit.

Fourth, the government asserts that "[t]he court of appeals did not even directly address what quantum of risk of failure must be demonstrated." (Br.Opp. 9). On that view the Eleventh Circuit left unresolved whether a showing of business necessity requires probability of occurrence evidence. But it is clear on the face of the opinion that the Eleventh Circuit held that the defendants had established a business necessity defense without any such evidence; that has to mean that probability of occurrence evidence simply is not required in the Eleventh Circuit. The Eleventh Circuit's insistence that business necessity can be based on a problem "that

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[8] R4-78, Ex. 4 at 170, 173.

may never occur" certainly concerns the quantum of risk. (Pet. App. 9a n.7).

The brief in opposition objects that the government never asked the court of appeals, in so many words, to hold that any possibility of a problem is sufficient to establish business necessity. Instead, the government argues, it merely relied in the court below on testimony of government witnesses who favored the disputed requirement. (Br.Opp. 8).[9] But in the Eleventh Circuit petitioner attacked the legal sufficiency of that testimony on precisely the ground at issue here, that the witnesses in question admitted they had no information at all regarding how often, if at all, the problems they hypothesized actually occurred.

> Dr. Kramer – the government's only expert – specifically ... admitted he had reviewed no scientific studies or data about hearing aids.... And Dr. Miller ... in a deposition ... gave the following testimony
>
> * * *
>
> Q. Have you come across any studies or published articles that suggest the likelihood or not that hearing aids are going to fail when

[9] The government characterizes as "uncontested" the testimony of its witnesses in favor of the disputed unassisted hearing test. (Br.Opp. 8). To the contrary, the plaintiff's witnesses insisted that that requirement was entirely unwarranted. (R101, Ex. J-1 at 3).

> used by law enforcement officers such as CSOs?
>
> A. No.[10]

There is no meaningful distinction between arguing that a defendant can establish business necessity without proof of probability of occurrence and arguing that a defendant can establish business necessity by relying on the testimony of a witness who reached his conclusion without having any information about probability of occurrence.

(2) The government does not deny that petitioner expressly urged the court of appeals to hold that a safety-related business necessity defense requires a showing of the likelihood that the disabled worker could cause harm to himself or others. (See pp. 2-3, 7-8). It objects, however, that petitioner's appellate brief did not refer to the section 12111(3) definition of "direct threat." (Br.Opp. 7, 11).

But the claim asserted in this case is under sections 12112(a) and 12112(b) of the ADA and under section 501 of the Rehabilitation Act. Section 12111(3) itself does not even create a cause of action. The government in this case has asserted a business necessity defense under sections 12112(b) and 12113(a), not a direct threat defense under section 12113(b).

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[10] Reply Brief of Appellant Allmond at 19-20.

The petition pointed out that in its brief in *Albertson's, Inc. v. Kirkingburg*, 527 U.S. 555 (1999), the government had argued that a safety-related business necessity defense requires proof of "significant risk." (Pet. 31 and n. 41). We noted that among the reasons advanced by the Solicitor General for adopting that proposed standard was a suggestion that the courts utilize in evaluating a safety-related business necessity defense under sections 12112(b) and 12113(a) the "significant risk" standard that would be applicable to a direct threat defense under section 12113(b). The government did not contend, nor do we, that the definition of "direct threat" in section 12111(3) is actually the statutory definition of "business necessity."

The government's argument in *Albertson's* regarding section 12111(3) is neither a distinct legal "issue" (Br.Op. 7) nor "the premise" of petitioner's contention that a business necessity defense requires a demonstration of the probability of occurrence. (Br.Opp. 10). Rather, it is simply one of a number of contentions that might support adoption of the Fifth Circuit probability of occurrence standard or some similar requirement, such as the "significant risk" standard proposed by the government itself in *Albertson's*.

The government cannot be suggesting that a petitioner, having squarely raised a specific issue in the court of appeals, would at the merits stage in this Court be limited to only the particular legal

authorities and precedents which were relied on in the lower courts. When the United States presents a merits argument as a petitioner, it has never regarded itself as restricted in the reasoning and materials which it can advance to the legal analysis and authorities that were earlier raised in the lower courts by government attorneys outside the office of the Solicitor General.

(3) At the time this action was filed, a plaintiff suing under the Rehabilitation Act or the ADA was required to show that he or she was, or was regarded as, disabled. In the instant case the district court held that there was a genuine issue of material fact regarding whether the defendants regarded Allmond as disabled, and set that question for trial. (Pet. App. 27a-36a). The government predicts it will prevail at trial on this issue, and argues that a resolution of the question presented in favor of petitioner thus would not alter the outcome of this case. (Br.Opp. 7, 13-15).

The government bases its prediction of a successful trial outcome on remand on the result in "the majority of" the other cases in which a dismissed CSO contended he or she was regarded as disabled. (Br.Opp. 13). The government argues that the general rationale for the unassisted hearing requirement does not assume that all individuals who fail to meet that requirement are disabled. (Br.Opp. 14). But in the instant case, as the district court noted, there was considerable evidence that federal officials specifically regarded Allmond as disabled, and believed

that an individual with his hearing loss would be disqualified from a wide range of positions. (Pet. App. 27a-36a). The brief in opposition contains no discussion of the evidence actually relied on by Allmond and the district court regarding this issue.

In any event, the question of whether Allmond was regarded as disabled is entirely distinct from the question of whether the challenged practice is unlawful under the ADA and the Rehabilitation Act. When, as here, a complaint is dismissed on one ground, it is commonly the case that there are other, unresolved issues on which the defendant might ultimately prevail at trial if the dismissal were overturned. The existence of such an unrelated issue does not make this case an inappropriate vehicle for resolving the question presented.

(4) The government insists that there is no conflict between the position of the Civil Division in the instant case, defending the USMS unassisted hearing test, and the action the Civil Rights Division attacking the legality of the identical requirement when utilized by local law enforcement agencies. The Brief in Opposition asserts that each of these actions turned on "the record" in the case at issue. (Br.Opp. 12 n.3).

But the element of the record in the instant case to which the Civil Division, and the court of appeals, attached controlling significance was simply the fact that "hearing aids may malfunction, break, or become dislodged." (Pet. App. 9a). That fact is assuredly true

of the hearing aids at issue in the cases initiated and settled by the Civil Rights Division. The actions of the Civil Rights Division obviously were not premised on a record showing that hearing aids used by local police officers and sheriffs' deputies are somehow different from and superior to the hearing aids used by CSOs.

In this Court the government appears to suggest that the unassisted hearing requirements might be legal in some instances (such as for the CSOs in the federal courthouse in Honolulu) but not in others (such as the Honolulu police). Elsewhere, however, the Department of Justice has insisted that the legal status of this requirement is the same in all situations, although offering conflicting accounts of what that legal status is. In *Gunnels*, for example, the USMS asserted that use of a non-assisted hearing requirement is always a matter of business necessity in the law enforcement context, broadly insisting that "[h]earing aids are not an acceptable means of meeting the hearing standard of law enforcement positions." 2004 U.S.Dist. LEXIS 31104 at 6 (S.D.Tex.). The Civil Rights Division, on the other hand, advised the Honolulu Police Department that "such a requirement imposes a per se ban on employment of persons with disabilities in violation of Title I and Title II of the ADA."[11]

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[11] R5-101, Ex. P at 15.

(5) Because of the distinct responsibilities of separate agencies within the executive branch, those agencies at times take inconsistent positions in the lower courts. When an issue comes before this Court regarding which inter-agency differences have arisen, the Solicitor General often fashions a final government position which resolves those disagreements.

In this case, however, the Solicitor General has chosen not to do so. The Brief in Opposition is scrupulously neutral regarding the question presented, taking no position for or against the Fifth Circuit requirement of proof of probability of occurrence. The government response neither endorses nor disagrees with the decision of the Eleventh Circuit in this case. If certiorari is denied as the government urges, the Civil Division will remain free to argue that unassisted hearing tests are legally justified as a matter of business necessity, while the Civil Rights Division will continue to be at liberty to take legal action against any state or local law enforcement agency which uses such tests, and the EEOC can proceed against private employers which do so. The Department of Justice will persist in contending that the federal government itself is subject to a less demanding legal standard than the Department applies to state and local governments.

Such a topsy-turvy form of federalism is inconsistent with the terms of the ADA and the Rehabilitation Act, and with the structure of the Constitution. Although the Solicitor General assuredly has the discretion to permit the continuation of such differences

among federal agencies, this Court should exercise its discretion to grant certiorari to resolve the inter-circuit conflict that has resulted.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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